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IN THE
COURT OF APPEALS OF INDIANA

JEFFREY G. GARRISON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A05-0803-PC-168
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Steven R. Nation, Judge
Cause No. 29D01-9802-CF-7:
29D01-0508-PC-142

October 21, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Jeffrey Garrison was convicted of child molesting as a class A felony and contributing to the delinquency of a minor as a class A misdemeanor. This court affirmed his convictions and sentence on direct appeal. Garrison now appeals the denial of his petition for post-conviction relief and presents four issues for our review, which we restate as:

1. Did Garrison receive ineffective assistance of trial counsel?

2. Did the trial court err in instructing the jury?

3. Is Garrison's forty-year sentence for class A felony child molesting manifestly unreasonable?

4. Did the trial court err in denying Garrison's request to take judicial notice of the trial record?

We affirm.

The facts, as set out by this court in Garrison's direct appeal, are as follows:

> In December 1996, some of Garrison's children and stepchildren, including S.M. and N.M., came to his apartment for the weekend. S.M., a female who was 12 years old at the time, brought a friend with her, J.F., who also was a 12 year old female. When Garrison arrived home, he gave beer to some of the children, which many of them drank. Later that evening, Garrison offered marijuana to S.M., N.M., and J.F. They accepted, and he rolled and smoked several marijuana cigarettes with the three girls in his bedroom. After smoking and drinking, N.M. went to the living room to sleep, S.M. passed out on the floor in Garrison's bedroom, and J.F. passed out on Garrison's bed. In the middle of the night, J.F. woke up and found that her pants and underwear were around her knees and that Garrison was laying partially on top of her inserting his finger into her vagina.
>
> Garrison was charged with child molesting, a class A felony, and contributing to the delinquency of a minor, a class A misdemeanor. A jury found Garrison guilty as charged. The trial court sentenced Garrison to 40 years imprisonment for child molesting and to one year for contributing to the delinquency of a minor, which were to run concurrently.

Garrison v. State, No. 29A02-0003-CR-210, slip op. at 2-3 (Ind. Ct. App. Nov. 22, 2000).

On direct appeal, Garrison argued that the evidence was insufficient to sustain his convictions and that the trial court improperly enhanced his sentence. We rejected both arguments, and thus affirmed his convictions and sentence. Garrison filed his petition for post-conviction relief on July 13, 2005. The trial court held a hearing on Garrison's petition on August 2, 2007. During the post-conviction hearing, Garrison called five witnesses. On September 21, 2007, Garrison moved the trial court to take judicial notice of the record of proceedings from his underlying trial. On November 16, 2007, the post-conviction court denied Garrison's request to take judicial notice of the trial record and also denied Garrison's PCR petition. This appeal ensued.

Our courts have stated on many occasions that the post-conviction process does not provide an opportunity for a "super-appeal." *See McCary v. State*, 761 N.E.2d 389 (Ind. 2002). Rather, post-conviction proceedings provide defendants the opportunity to present issues that were not known at the time of the original trial or that were not available upon direct appeal. *Ben-Yisrayl v. State*, 738 N.E.2d 253 (Ind. 2000), *cert. denied*, 534 U.S. 1164 (2002). In post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective assistance of counsel or issues demonstrably unavailable at the time of trial or direct appeal. *Sanders v. State*, 765 N.E.2d 591 (Ind. 2002).

If a PCR petition has been denied, the petitioner must convince the reviewing court that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that of the post-conviction court. In other words, "'[t]his Court will disturb a post-conviction court's decision as being contrary to law only where the evidence is without conflict and

leads to but one conclusion, and the post-conviction court has reached the opposite conclusion.'" *McCary v. State*, 761 N.E.2d at 391-92 (quoting *Miller v. State*, 702 N.E.2d 1053, 1058 (Ind. 1998), *cert. denied*, 528 U.S. 1083 (2000)). When conducting our review, we accept the post-conviction court's findings unless they are clearly erroneous, Ind. Trial Rule 52(A), but accord no deference to its conclusions of law. *Davidson v. State*, 763 N.E.2d 441 (Ind. 2002), *cert. denied*, 537 U.S. 1122 (2003). The post-conviction court is the sole judge in assessing the weight of the evidence and the credibility of witnesses. *Id*.

1.

Garrison first claims that he received ineffective assistance of trial counsel. Garrison specifically alleges four instances of ineffective assistance: (1) failure to call witnesses; (2) failure to adequately prepare a defense; (3) failure to object to evidence of prior allegations against Garrison; and (4) failure to object to imposition of an enhanced sentence.

The Sixth Amendment to the United States Constitution guarantees the defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). When considering a claim of ineffective assistance of counsel, we apply the following standard of review:

> To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Failure to satisfy either prong will cause the claim to fail.

Walker v. State, 843 N.E.2d 50, 57 (Ind. Ct. App. 2006) (citing *Strickland v. Washington*, 466 U.S. 668) (internal citations omitted), *trans. denied*.

In reviewing an ineffective assistance of counsel claim, we afford great deference to counsel's discretion to choose strategy and tactics. *McCary v. State*, 761 N.E.2d 389. Strategic and tactical decisions will not support a claim of ineffective assistance. *Id*. "Furthermore, '[i]solated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective.'" *McCary v. State*, 761 N.E.2d at 392 (quoting *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001)).

Garrison's first two claims of ineffective assistance are related, so we will address them together. Garrison argues that counsel was ineffective for failing to call certain witnesses on his behalf and for failing to adequately prepare a defense. In support of his arguments, Garrison claims that trial counsel failed to interview, depose, or call as witnesses Tina Smith (now Tina Elder), Lindsey Carpenter, Michael Fisher, and Jeremy Marner.

In his PCR petition, Garrison claimed that Tina Smith would have provided him with an alibi and that Jeremy Marner's testimony would have corroborated the alibi. He further claimed that Lindsey Carpenter would have testified that the victim made up the molestation allegation and that the victim's reputation in the school community was not good. With respect to Michael Fisher, the victim's father, Garrison claimed that he would have established the victim's motive to lie by informing the jury that at the time of the molestation there were ongoing legal proceedings relating to custody of J.F.

Each of these witnesses was called during the PCR hearing. We have reviewed their proposed testimony and agree with the trial court's assessment that none of the witnesses

would have testified as Garrison alleged in his PCR petition. To be sure, the testimony of these witnesses would not have been helpful to Garrison's defense (i.e., it would not have established an alibi and was not probative of a motive to lie) and would have had no impact on the outcome of the trial. In this regard, Garrison has wholly failed to establish that his trial counsel was deficient in the preparation of his defense because he failed to interview, depose, or call these insignificant witnesses.

Garrison also argues that his trial counsel was ineffective for failing to file a motion in limine prior to trial and to object to testimony during trial regarding references to his prior acquittal on child molesting charges in Howard County. In support of this argument, Garrison cites to the record of trial proceedings which was not admitted in evidence before the post-conviction court and is not before this court on appeal. We cannot therefore evaluate Garrison's claim of ineffective assistance in this regard.[1]

Finally, Garrison argues that his trial counsel was ineffective for failing to challenge the trial court's imposition of an enhanced sentence. Since this court has already considered the propriety of the sentence imposed, Garrison's argument in this regard is rendered moot.

Having reviewed the record, we conclude that Garrison has wholly failed to overcome his heavy burden of establishing that he received ineffective assistance of trial counsel. The post-conviction court did not err in rejecting his claim.

[1] From the trial court's findings of fact and conclusions of law, it appears as though Garrison's trial counsel elicited the evidence regarding his prior acquittal in another county on molestation charges. Having introduced such evidence, Garrison's trial counsel could not have then moved for a mistrial. With regard to whether Garrison was prejudiced by the introduction of such evidence, we note that Garrison did not call his trial counsel as a witness during the PCR hearing. As noted by the trial court, it very well could be that introducing such evidence was part of Garrison's trial counsel's strategy to discredit S.M. and N.M. *See McCary v. State*, 761 N.E.2d 389 (courts afford great deference to counsel's strategy and tactics).

2.

Garrison next brings a free-standing claim that the trial court erred in instructing the jury. Specifically, Garrison claims that it was improper to give the final jury instruction 18 which was tendered by the State. That instruction informed the jury as follows: "A conviction for child molesting may rest solely upon uncorroborated testimony of the victim." *Appellant's Brief* at 15. Garrison argues that the instruction is a misstatement or incomplete statement of the law, that it improperly invaded the province of the jury with its reference to "the victim", and that use of the word "uncorroborated" in the instruction was confusing and misleading.

Garrison's argument tracks our Supreme Court's analysis in *Ludy v. State*, 784 N.E.2d 459 (Ind. 2003), wherein our Supreme Court disapproved of the use of an instruction substantially similar to the one challenged by Garrison. Our Supreme Court overruled prior appellate decisions that, at the time of Garrison's direct appeal, had upheld the giving of such an instruction. In announcing the new rule, the Court stated that the rule applied to those cases where the defendant had properly preserved the issue and whose case was then pending on direct appeal, thus making it clear the new rule did not apply retroactively. *Ludy* was decided over two years after Garrison's direct appeal was final. Therefore, the post-conviction court properly rejected this claim.

3.

Garrison also brings a freestanding claim challenging his sentence as inappropriate and in violation of *Blakely v. Washington*, 542 U.S. 296 (2004). In his direct appeal, Garrison challenged the propriety of his sentence, arguing that three of four aggravating

factors considered by the trial court were improper and thus, an enhanced sentence was not justified. We rejected his argument and affirmed the sentence imposed. Garrison cannot take a second bite at the apple and challenge his sentence again through post-conviction procedures. With regard to his claim that his sentence is in violation of *Blakely*, such claim is not available to Garrison because *Blakely* does not apply retroactively to cases that were final before it was decided. *See Smylie v. State*, 823 N.E.2d 679 (Ind. 2005), *cert. denied*, 546 U.S. 976.

4.

Finally, Garrison argues that the trial court erred in denying his request to take judicial notice of the trial record. As noted above, Garrison filed a motion requesting the trial court to take judicial notice of the record of trial proceedings nearly two months after the hearing on his PCR petition. The trial court denied the motion.

A post-conviction court may not take judicial notice of the record of trial proceedings unless exceptional circumstances exist. *Douglas v. State*, 800 N.E.2d 599 (citing *State v. Hicks*, 525 N.E.2d 316 (Ind. 1988)), *trans. denied*. Absent such exceptional circumstances, the proper procedure is for the trial record to be admitted into evidence just like any other exhibit. *Id*. Here, Garrison failed to submit the trial record into evidence and has failed to show exceptional circumstances justifying the exercise of judicial notice. We therefore conclude that the post-conviction court properly denied Garrison's motion to take judicial notice of the record of the trial proceedings.

Judgment affirmed.

DARDEN, J., and BARNES, J., concur